

*Question 3.* What percentage of BIA officers are cross-commissioned? How about tribal officers?

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BYRON L. DORGAN TO HON. JOE A. GARCIA

*Question 1.* In their testimony, the Interior and Justice Departments indicated their opposition to Section 304 of the draft bill that would increase tribal court sentencing authority to 3 years imprisonment. The agencies stated their concern that the provision could adversely impact defendants' constitutional rights in tribal courts. Please discuss NCAI's position on the protection of constitutional rights in tribal court systems?

Answer. Section 305 of the draft legislation would extend tribal sentencing limitations under the Indian Civil Rights Act to provide for up to 3 year sentences for more serious offenders. In the original 1968 law, tribal sentencing authority was limited to 6 months or \$500. In 1986, the authority was expanded to 1 year or \$5000.

As a general matter, the rights guaranteed by the United States Constitution do not apply to tribal courts. Rather, the Indian Civil Rights Act (ICRA) incorporates similar protections as are found in the U.S. Constitution and makes them applicable to tribal courts. As such, defendants in tribal courts do not have "constitutional rights" other than rights recognized in the tribal constitution. Defendants in tribal courts do, of course, have a statutorily guaranteed right to many of the due process protections contained in the U.S. Constitution under ICRA.

We assume that the federal agencies are raising concerns that the full panoply of rights that have been enumerated in the U.S. Constitution would not be available to defendants in tribal courts, to the extent that some of those rights are triggered by a sentence that is greater than one year.

First, the Supreme Court has recently confirmed that an Indian tribe acts as a separate sovereign when it prosecutes its own members or nonmember Indians, and such prosecution is not an exercise of federal power. *United States v. Lara*, 541 U.S. 193 (2004). The power that Congress would exercise here is Congress's broad power in Indian affairs with its source in several places in the Constitution, and there is "no explicit language in the Constitution suggesting a limitation on Congress' institutional authority to relax restrictions on tribal sovereignty previously imposed by the political branches." *Lara*, 541 U.S. at 546.

As a matter of constitutional law, the length of the sentence imposed matter differently across constitutional rights. For example, the Sixth Amendment right to counsel is applicable as long as the defendant receives any imprisonment at all. See, *Alabama v. Shelton*, 535 U.S. 654 (2002). The right to a jury trial does not attach to all criminal offenses, but only attaches for all offenses that are not "petty offenses," which the Supreme Court has defined as six months in jail or less. See, *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538 (1989).

The Fifth Amendment provides a right to a grand jury indictment for "infamous" crimes, and a one-year sentence is the dividing line for infamous crimes. See, e.g., *U.S. v. Fitzgerald*, 89 F.3d 218 (5th Cir. 1996) ("Any federal offense punishable by imprisonment for more than one year is an offense for which the Fifth Amendment requires a grand jury indictment."). This is the only criminal procedure issue we can find that would relate to the expansion of tribal sentencing authority beyond one year.

However, unlike many other provisions of the Bill of Rights, the Supreme Court has ruled that the right to indictment by grand jury is not a fundamental aspect of due process, and was not incorporated to apply to state courts via the Fourteenth Amendment, and states therefore may elect not to use grand juries. *Hurtado v. California*, 110 U.S. 516 (1884). "[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Because tribal prosecution is not an exercise of federal power, and because the right to a grand jury indictment has never been considered a fundamental aspect of due process, we do not believe that the expansion of tribal sentencing authority should trigger constitutional concerns for Congress. However, NCAI strongly supports the protection of due process in tribal courts, and we note that the legislation would specifically protect the right to assistance of counsel and the general right to due process in criminal proceedings.

*Question 2.* Please provide your legislative recommendations, if any, to initiatives that should be included in the reauthorizations of the tribal courts, tribal youth, and other tribal justice programs.

Answer. As noted in our testimony, one of the primary recommendations of tribal leaders has been to make funding from the Department of Justice programs more readily available and more useful for the actual needs on reservations. Right now, the funding requires a significant grant-writing capability and is often compartmentalized in ways that do not make sense. Our recommendation would be for Congress to consider something like the following:

25 U.S.C. § 458 —to read:

(a) Notwithstanding any other provision of law, the Attorney General shall carry out a program within the Department of Justice to be known as the Tribal Justice Self-Determination and Self-Governance Program.

(b) Notwithstanding any other provision of law, the Attorney General shall enter into contracts, compacts and funding agreements in accordance with Title I and IV of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, with any Indian tribe who elects to utilize the authority of this title to govern any funds available to Indian tribes under the authority of the Attorney General.

(c) Notwithstanding any other provision of law, the negotiation and implementation of each agreement entered into under this section shall be governed by this title and the provisions of Title I or IV of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended.

(d) Regulations.

(I) Not later than 90 days after [DATE OF ENACTMENT], the Secretary shall initiate procedures under subchapter III of chapter 5 title 5 to negotiate and promulgate such regulations as are necessary to carry out this part.

(II) A negotiated rulemaking committee established pursuant to section 565 of title 5 to carry out this section shall have as its members only Federal and tribal government representatives, a majority of whom shall be representatives of Indian tribes with self-governance agreements under this chapter.

(III) The Secretary shall adapt the negotiated rulemaking procedures to the unique context of Self-Determination and Self-Governance and the government-to-government relationship between the United States and the Indian tribes.

(IV) The lack of promulgated regulations shall not limit the effect of this part.

*Question 3.* Please include any other recommendations or comments on the draft bill.

Answer. NCAI strongly encourages the Committee to consider including the pilot project to expand tribal jurisdiction in cases of domestic violence that was included in the concept paper for the bill last November. This provision was widely supported by Indian country and is a common-sense solution to one of the most pressing problems in tribal communities. Tribal governments should have the authority to intervene when a non-Indian who has chosen to become a member of the tribal community abuses his Indian family members.

NCAI also encourages the Committee to consider including some of the recommendations for improving the effectiveness of the Adam Walsh Act in Indian Country that were made at the July 17, 2008 hearing on sex offender registration.

There are many excellent provisions in the legislation and NCAI has had a significant opportunity to provide input, so we will limit our recommendations at this time to these two, and encourage the Committee to continue its efforts to receive recommendations from tribes.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. LISA MURKOWSKI TO HON.  
JOE A. GARCIA

*Question 1.* Both the Departments of the Interior and Justice appear to have serious concerns about provisions in the draft bill that would increase tribal court sentencing authority and allow tribally-sentenced Indian defendants to serve their time in the Bureau of Prisons system. How might tribes address the additional requirement of the defendant's right to legal counsel in implementing the increase in tribal sentencing authority to three years as contemplated by the draft bill?

Answer. First, NCAI strongly supports the provision which would allow tribes to send serious offenders to serve their time in the Bureau of Prisons system. As the Committee is aware, tribal detention facilities have been neglected and are significantly under funded. This is one of the most important provisions of this legislation.